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Banking & Finance Insights

By BLC CHAMBERS

Contents

Welcome to this new edition of Banking & Finance Insights, a periodical publication of BLC that seeks to address topical issues in the areas of banking and finance in Mauritius and globally.

Free trade has extended the horizon of business opportunities around the world, allowing emerging markets to develop and to attract investors. In Apartes, we have analysed the key parameters of multi-jurisdictional transactions and the role that lawyers have played in this evolution with the contribution of Stephen Denyer, who has shared with us his experience as a long standing transactional English lawyer and today as the Head of Global division of the Law Society of England & Wales.

In their attempt to counter balance the risks associated with multi-jurisdictional transactions, financial organisations have developed standardised legal instruments used across countries, but Stephen Denyer touches on a number of concerns arising from the use of standard documents. In the specific area of finance, the Loan Market Association's (LMA) loan agreements are the reference in sophisticated financing transactions but questions remain as to the extent to which these agreements enforceable in the multiple jurisdictions involved in a particular transaction.

We have dedicated the main feature of Legal Updates to the differing views between common law and civil law systems on the enforceability 'one way jurisdiction clauses' commonly used in the LMA template of loan agreements and debated the approach a Mauritian court would adopt if it had to rule of its validity. We also consider the recent changes brought by the LMA further to a Hong Kong Court judgment relating to individual lender's rights under a syndicated loan.

We will continue our series on salient Things to Know on Mauritian security interests; this time we will take a look at floating charges. In our FAQ section, we will also address the concept of 'financial assistance' under Mauritian corporate law. This edition will finally provide an overview of the other recent Mauritian legal developments.

Wishing you an enjoyable reading.

This newsletter contains information about banking and finance. It is intended to provide a brief overview of the topics with which it deals and does not necessarily cover every aspect of these topics. The information is not advice, and should not be treated as such. You must not rely on the information in this newsletter as an alternative to legal advice from an appropriately qualified professional. If you have any specific questions about any legal matter covered in this publication please consult us. You should never delay seeking legal advice, disregard legal advice, or commence or discontinue any legal action because of information in this newsletter.

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APARTES
with Stephen Denyer*

DOING BUSINESS ACROSS THE BORDERS

Free trade creates massive business opportunities around the world, which allow emerging markets to develop and to attract investors on their land. This trend prompts the high expectation that lawyers be able to deliver the legal services and have the expertise to deal with the new parameters of multi-jurisdictional transactions. Through the years lawyers of leading Western jurisdictions have adjusted their practices to answer to the exigencies and challenges of cross-border transactions; creating a new landscape of the legal services market.

Globalisation also triggers the need to mitigate a number of risks be it political, economic or legal, linked to a specific country, which is fundamental for lenders or investors.

The imperative to curb legal risks led to development and use of standardised transaction documentation, which every party can understand and apply in different countries. Organisations like the Loan Market Association in the United Kingdom (LMA) or the Loan Syndications and Trading Association in the United States develop standard loan documents as the starting point for negotiations between parties bringing parameters to legal certainty for the international lenders. However, these standard loan documents may be perceived as pro-financiers with provisions, which may not be applicable or enforceable in every jurisdiction. An illustration of this limitation is the current debate on the validity of 'one-way' jurisdiction clause included in the LMA loan documents which is differently interpreted in common law and civil jurisdictions. Our main article in this new edition's "Legal Update" will assess the potential impact of this topical debate on recognition before the courts of Mauritius.

We have asked **Mr. Stephen Denyer***, the Head of City and International at the Law Society of England to share with us his experience of the globalisation of the legal profession over the years. Stephen also provided his views on the standardisation of legal frameworks and transaction documentation in international deals.

Historically, when did UK Lawyers start to go global?

Stephen Denyer: *It has been over the course of my career; if you look back 38 years ago, the large firms in London were already doing a huge amount of international work, but they were doing it from London.*

Partners were flying around the world, using English law, particularly on finance transactions and cross-border deals.

The 1980's is the decade when London firms started to have bigger networks of international offices, sending expat lawyers from their head office to establish local offices, which of course really enabled them to provide top class English law expertise with a local flavour but didn't cover the local law element. So, the challenge then was of developing a local law capability and integrating that into the firm. Firms had to decide when they are going to merge or grow organically in different jurisdictions. You would point to the 1990's as the decade when big firms started branching out from just practicing English law by-and-large to seriously starting to do local law and New York law alongside English law.

What are the challenges and issued faced by UK firms when opening local offices or establishing relationships with local firms in other jurisdictions?

Stephen Denyer: *To start with, it is easier if you are in a common law jurisdiction and tougher if you are in a civil law jurisdiction. A lot of developments initially happened in Europe, within the European Union, we had one open market for legal services which was created in the early 1990's and that made the firms have the challenge of developing a serious civil law capability in a lot of different jurisdictions. And then of course, the BRICS emerging around the early 2000's was really when the firms started to want seriously to practice Russian law, Chinese law, Brazilian law etc. So I would say that added a whole new layer. Firms had to feel they could hire people who were sufficiently talented, knowledgeable and experts in local law but also who had some international standards and international understanding. So firms in a lot of countries opened their own offices, you've got plenty of firms now that have 40-50 offices in 30-35 countries. Of course, there are many more jurisdictions in the world than firms will ever have local offices because global jurisdictions are still increasing in number actually as some jurisdictions split*

Then, there are several jurisdictions that are either too small, where there are restrictions on local practice or where the quality of the local law service and the local expertise is so high

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that there is no real incentive, no need for firms to establish their own offices.

So whereas people used to think, maybe 15 years ago that you would slowly see the end of best-friend relationship, actually we've seen the growth of best-friend relationship. Even the most global firms now feel it is more than less important to have strong links with leading local firms where they don't have a local capability or where they are not full service.

> ***"…Financial markets and financial institutions can't stand uncertainty"***

Non-western countries have been slower to adopt legal market liberalisation measures and Mauritius reforms date back to only 2008 with a very limited number of foreign lawyers registered. With this globalisation of lawyers' practice should there be a global regulation of lawyers ethical conducts in a different jurisdiction or in cross-border transactions?

Stephen Denyer: *This is one of the limits of globalization with the binding ethical standards generally being jurisdiction-by-jurisdiction. Internationally, there are predominantly codes of conduct rather than something binding like the International Bar Association's International Principles on Conduct for the Legal Profession or the Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers. In England and Wales, we do have overseas practice rules which apply to English lawyers operating internationally; so if an English solicitor operates outside of England and Wales, there are rules and requirements as to how they practice.*

How do you see the role of local lawyers, especially from emerging countries, in the globalisation of transactions?

Stephen Denyer: *So for Mauritian lawyers, thinking about your place in the world, the quality of lawyers and the quality of legal services is one factor. I think there is a great opportunity for you to encourage more work to Mauritius; both by being an open jurisdiction and also by considering international standards in how the law evolves and how firms operate. Given the nature of your economy and the potential importance of financial services and professional services, a strong legal sector with firms operating to international standards draws more work into the country and is good for everybody.*

Legal certainty in global transactions commanded deeper reflections on the legal frameworks and how certain areas of transactional law around the world could be harmonised or recognised in different countries. International institutions like UNCITRAL, OECD or the Basel Committee on Banking Supervision regularly produce model laws, codes and other international standards which are embodied in local laws or adopted by financial institutions worldwide. Many countries member of international organisations tend to ratify certain treaties or model laws very quickly but never implement them in their local laws. How can this impact on the country capability to welcome international business?

Stephen Denyer: *The implementation of international treaties is notoriously slow and difficult. What we are now seeing is a lot being driven by free trade agreements. Free trade agreements; like The Transatlantic Trade and Investment Partnership, currently being negotiated between the United States and the European Union. That is as much of a drive as anything else to international standards and openness. But for sure the more diligent the jurisdiction is in implementation, the more attractive it makes itself.*

Standard transaction documentation like the LMA loan documents or the International Swaps and Derivatives Association developed the ISDA Master Agreement for derivatives transactions enables the parties to make various elections to limit legal risk whilst allowing for continuity of transactions. They also ensure a fast turnaround of deals with lawyers being familiar with the same documents. The LMA may be the most popular model for tailor-made loan documentation, like in Asia-Pacific or Africa with the Asia Pacific Loan Market Association or the integration of the Africa Loan Market Association into the LMA for the EMEA region. What is your experience using these standard documentations in international transactions and the impact on legal risks?

Stephen Denyer: *Market standards such as the LMA, in a way represent the market forcing common standards being contractually obligated rather than as a result of treaties. Having good local counsel who can advise on how these international terms can be adapted or applied locally is very valuable. But you need people who have looked at this documentation in detail and worked with it on many occasions. So this is why in a jurisdiction like Mauritius there will be a small number of firms that are really credible particularly for international finance work because they are especially familiar with the standard documentation. So the danger is that you have an unfamiliar local firm who doesn't understand how the documentation works, or there is a consequence under on the local law which hasn't being tested or thought of. I think that standard documentation does limit legal risks but of course it can come unstuck and you really need skilled practitioners. This is why top quality legal advice provided early is so important rather than just presenting the local lawyer with documentation that has already been fully negotiated and*

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asking him to confirm if it's alright. I think we can highlight that's very dangerous approach.

Although the LMA models and other international standard loan documentations are expanding to all continents, we see that in some well-established legal and financial markets in Africa or Asia, local lawyers have over time developed their own way of documenting sophisticated transactions and this may be a barrier or a timing issue in international transactions.

Stephen Denyer: *I agree, I think ultimately, that the client is the driver. Financial institutions are taking responsibility for driving this change. But I think also that the big international firms can do more in terms of offering workshops and training in market standard documentation. Possibly, there is a role for law societies and similar bodies in that.*

Despite the globalisation of the transaction documents and practice, the governing law of the most loan agreements in sophisticated cross-border transactions has remained English law or New York law. Why, in your opinion?

Stephen Denyer: *They are indeed the preferred governing laws rather than the local law and there are two very simple reasons to that. Firstly, because they have been used for so many years in relation to complex financial transactions, they may give real predictability and certainty about what the result is going to be. So there are no surprises or very few surprises anyway; financial markets and financial institutions can't stand uncertainty. Secondly, particularly because when you are dealing with the government if you are governed by local law, then the government can always change the law to get out of their obligations. Take Greece and Greek bonds as an example. Before the Greek crisis really hit, the Greek bonds governed by Greek law where the Greek government could change the law to potentially get out of some of their obligations traded a 10% discount compared to Greek bonds governed by English or New York law. So the market actually put a value on the certainty and the assurance that the laws were not going to be changed. Frequently, you will get financial institutions that won't do deals that are governed by local law. However, we can't be complacent about English or New York law, local law is chosen for certain transactions, of course.*

*Acknowledgment: We would like to thank Mr Stephen Denyer and members of his team for their time and contribution to this article.

Stephen Denyer is Head of City and International at The Law Society of England & Wales.

Prior to joining the Law Society, Stephen spent more than 36 years with Allen & Overy. During his career with that firm he was responsible for establishing, expanding or managing 11 of the firm's international offices and had management responsibility for teams comprising several hundred fee earners and support staff from many different countries. His experience with the firm encompassed downsizing and spin offs as well as growth and integration. He oversaw mergers and associations with other law firms some of which involved multiple offices comprising large legal teams.

Throughout his career Stephen has been at the forefront of the globalisation of legal services. With an extensive track record of creating bonds with lawyers and law firms from different jurisdictions and cultures, he played an instrumental role in the internationalisation of both Allen & Overy and of legal practice. He is also an author, commentator and strategic advisor as well as a respected manager and leader.

The Law Society
of England and Wales

http://communities.lawsociety.org.uk/international/about-us/join-the-international-division/

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LEGISLATIVE UPDATES

Would Mauritius Courts follow Popplewell J in support of Asymmetric Jurisdiction Clauses?

Amongst the variety of clauses in commercial agreements which define the forum for disputes, the asymmetric jurisdiction clause (also called the one-way jurisdiction clause), has found favour with an increasing number of lenders in finance agreements. Asymmetric jurisdiction clauses require one party to submit a dispute arising from an agreement to a particular court or to a particular set of arbitral procedures while allowing the counterparty the flexibility to commence legal proceedings in the venue of its choice. This diverges from the more classic approach of mutuality of obligations provided by the *exclusive-jurisdiction* or *non-exclusive jurisdiction* clauses where both parties are afforded the same options or subjected to the same constraints when it comes to choosing a forum for their disputes.

The widespread use of asymmetric jurisdiction clauses has strong underpinnings: the party who bears the primary commercial risk under the contract is given the benefit of the option. This rationale is glaringly relevant in financial transactions. A creditor can take legal action against the debtor in a chosen court, such as the debtor's jurisdiction of incorporation, but retains the flexibility to litigate where the assets of the borrowers are located at the time a dispute arises, subject to the chosen forum accepting jurisdiction. The flexibility afforded by such clauses reduces legal risk by minimising the impact that the debtor's obligations may be unenforceable in a particular forum.

Asymmetric jurisdiction clauses have become boilerplate for financial institutions and are found in a large number of loan documents, including the LMA facility agreements.

The enforceability of asymmetric jurisdiction clause has recently been challenged by French courts, firstly in *Mme X v Banque Privée Edmond de Rothschild*[1] and subsequently in *Danne v Credit Suisse*[2]. While this issue has not be brought to the courts of Mauritius, Popplewell J in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Sujana Universal Industries* noted that it was likely that the asymmetric jurisdiction clause would be upheld under Mauritian law.

Rothschild decision

The French *Cour de cassation* raised concerns on the enforceability of asymmetric jurisdiction clauses in its decision in Rothschild when it held such a clause in a loan agreement as void.

The *Rothschild* decision was based on a provision of Article 23 of the Brussels Regulations applicable to the member states of the European Community. The French court ruled that the jurisdiction clause was *potestative*[3] and, thus void and unenforceable.

Stakeholders, including French lawyers, have widely criticised the *Rothschild* decision; in addition to the various criticisms levelled at the French court, the decision also undermines the principle of certainty of result which is highly valued by commercial parties, particularly financiers. Irrespective of those criticisms, the principle of *potestativité* used as the ratio decidendi stems from the French court's application of the Brussels Regulations to French laws. The decision is not a test of the enforceability of the asymmetric jurisdiction clause in light of Article 1174 of the French civil code[4] Such a test would have carried significant weight given the propensity of the Mauritian courts to follow the decisions of the French courts in matters relating to the interpretation of the civil code.

Despite criticism, in March 2015, the French *Cour de cassation* cast further doubt on the enforceability and effectiveness of asymmetric jurisdiction clauses in the decision of *Danne v Credit Suisse.* It considered the validity of the asymmetric jurisdiction clause under the Lugano Convention. The relevant article of the Lugano Convention is materially identical to the provision of the Brussels Regulations considered in *Rothschild.* Unlike *Rothschild*, however, the French court did not refer to the *potestativité* principle; it emphasised the lack of objective criteria setting out the basis for determining any alternative jurisdiction. In addition the French court considered the unbalanced nature of the asymmetric jurisdiction clause to be in conflict with the aims of the Lugano Convention.

1. Cass. 1e civ., 26 sept. 2012, n° 11-26.022, bull. civ. n° 983, SA Banque privée Edmond de Rothschild Europe c/ Trontin, épouse Banos

2. Cass. 1e civ., 25 mars 2015, n° 13.27.264, bull. civ. n° 415

3. A 'potestative' provision is one which makes the fulfillment of the agreement dependent upon an event which one of the contracting parties has the power to make happen or to prevent from happening. Such provisions do not typically relate to issues emanating from jurisdiction but rather, derives from the law relating to conditions precedent.

4. Article 1174 of the French civil code has been replicated in the Mauritian civil code.

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Party autonomy rather than equal access to justice

Closer to home, *Rothschild* was followed by a decision of the English High Court in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Sujana Universal Industries.*

The parties entered into a Mauritian law-governed loan agreement which was subsequently restructured pursuant to an amended and restated agreement governed under the laws of England. In addition to affirming the contracting parties' choice of amending the governing law of the asymmetric jurisdiction clause from Mauritian to English law, the English High Court upheld the enforceability of the asymmetric jurisdiction clause. Popplewell J took the pains to stress that "such unilaterally non-exclusive clauses are ubiquitous in the financial markets".

Popplewell J further noted that the Rothschild decision was "controversial and has been subjected to criticism by commentators, both domestically and in the context of Article 23 which requires an autonomous interpretation"; it may well be that Rothschild should not be considered as good source of judicial interpretation.

Anyone wishing to infer that an asymmetric jurisdictional clause goes against the principles of equal access to justice, Popplewell J commented that "that is the contractual bargain to which the court should give effect".

Until the European Court of Justice sheds light on the use of asymmetric jurisdiction clauses from an EU law perspective, and in particular where there is a French nexus, parties must assess the advantages of such clauses and remain exposed to the risk of these being found to be void and unenforceable.

While the enforceability of the asymmetric jurisdiction clause was examined within the parameters of English law, Popplewell J attempted to shed some light on the issue from a Mauritian law perspective and concluded, as an obiter, that notwithstanding the *Rothschild* decision, there was a good arguable case that under Mauritian law an asymmetric jurisdiction clause would be treated as valid and enforceable.

Fortunately, it may result that a debate on the application of the *potestativité* principle of the Mauritian civil code is largely academic. An application of Article 1174 of the Mauritian civil code to an asymmetric jurisdiction clause would not be framed within the context of, and governed by, the Brussels Regulations. However, lenders should remain cautious where asymmetric jurisdictions clauses are included in Mauritian law agreements. The reality is that such clauses remain untested in a Mauritian context. In any event they should no longer be considered boilerplate and lenders should assess, on a case-by-case basis, the perceived advantages of the asymmetric jurisdiction clause against the risk that it may be found void and unenforceable.

The model asymmetric jurisdiction clause in an English law LMA Single Term Facility Agreement:

Jurisdiction

(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement)] ***(a "Dispute")****.*

(b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(c) This Clause is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.

Loan Market Association restores clarity on individual lender's rights under syndicated loans

A Hong Kong court of first instance[5] raised doubts over the established view that the debts of a borrower to the lenders in a syndicated loan are individual and separately enforceable. Following concerns that the nature and extent of a finance party's separate and independent rights were undermined by the court's decision, the Loan Market Association **(LMA)** has on 5 November 2015 published revised versions of its facility agreements governed under English law.

It is the established view in syndicated finance that the lenders' obligations to the borrower are several. So the other lenders are not responsible for the shortfall where one lender fails to perform and disburse. Firmly linked to this notion, it has also been the traditional view that the borrower's obligations towards the lenders are several.

The recent Hong Kong court judgment concerned a facility agreement governed under the laws of Hong Kong. In this decision, the court held that:

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5. in Charmway Hong Kong Investment Ltd & Ors v Fortunesea (Cayman) Ltd & Ors [2015] HKCFI 1308, 28 July 2015

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- the various provisions in the finance parties rights' clause of the facility agreement did not say when, if at all, a debt to an individual lender would arise. In particular, the finance parties' rights clause did not create a debt owed to each lender.
- under the event of default clause, it was the majority lenders who were given the power to call for immediate repayment of the loan by instructing the administrative agent to make an immediate demand.

In coming to this analysis, the Hong Kong court unfortunately determined that the facility agreement created an aggregated loan and that the individual lender had no right to enforce its share of the debt when due. In the absence of an express provision giving individual lenders a right to take independent enforcement proceedings, it is for the majority lenders to decide what enforcement proceedings to take. The result of this interpretation is that, other than in specified circumstances giving the individual lenders the express right to recover (such as illegality or change of control), lenders must use the mechanism of collective action to enforce a due debt following payment default.

In light of this interpretation, the LMA has amended its standard documents to reiterate the individual nature of a lender's right to payment due under the finance documents to remove any room for argument. The LMA thus restores the traditionalist view that a syndicated loan allowed an individual lender to take action to recover its share of the loan when due unless expressly prohibited.

It is anticipated that the LMA will also revise its European and Africa law facility documentation to incorporate the clarificatory wording to the finance parties' rights clauses.

MCB v UBS[6], Court applies procedure under International Arbitration Act 2008

The Commercial Division of the Supreme Court of Mauritius held that the issue as to applicability of the arbitration clause under a facility agreement was not open for it to determine; the case must be automatically transferred to the Supreme Court of Mauritius for a determination under section 5 of the International Arbitration Act 2008.

UBS AG, as the second defendant before the Commercial Division, requested the Commercial Division to make an order under section 5 of the International Arbitration Act 2008 for the proceedings brought by MCB be transferred to the Supreme Court of Mauritius constituted under section 42 of the International Arbitration Act 2008 for the latter to determine whether the parties should be referred to arbitration.

The Commercial Division stayed the action brought by MCB pending the determination of the Supreme Court of Mauritius under section 5 of the International Arbitration Act 2008.

MCB v Realpoint[7], Court dismisses application for receivership but grants an order for séquestre judiciaire[8]

MCB made an application for the appointment of a receiver manager under the Insolvency Act 2009 **(Insolvency Act)** or alternatively, for an order under article 1961 of the Mauritian Civil Code for the séqueste judiciaire of the assets of the respondent, Realpoint (Mauritius) Limited including the shares held by the respondent in Varun Shipping Co Ltd **(VSCL)**.

In connection with the facility, the respondent granted to MCB an irrevocable power of attorney entitling MCB to sell, transfer or dispose of the VSCL shares. Additionally, the respondent pledged the VSCL shares in favour of MCB. The pledge of shares was never perfected.

Because the pledge of shares was never perfected, the Court was not satisfied that the shares in VSCL were 'secured'; there was also no evidence to indicate that either the facility agreement or the power of attorney constituted *a charge or gage (pledge) within the meaning of the Insolvency Act.* In order for a receiver to be appointed by the Court, the Insolvency Act requires that the asset constitutes secured property. Consequently, the Court held that the application did not meet the requirements for appointment of a receiver by the Court under the Insolvency Act and dismissed the application.

The Court then considered MCB's application for *séquestre.* One of the criteria for granting the *séquestre* was that there is a danger for the applicant to leave the assets in the hand of the other party.

The Court was convinced that the criteria for granting the *séquestre* were satisfied in the present case; the interests of MCB were unquestionable in jeopardy and the appointment of a *guardien judiciaire* in respect of the VSCL shares was necessary to safeguard MCB's interests and to preserve its rights under the power of attorney. The Court therefore granted the order for *séquestre* and appointed a *guardien judiciaire* mandated to take all steps that are necessary to safeguard the VSCL shares

6. Mauritius Commercial Bank Ltd v UBS AG. Singapore Branch & Anor, 2015 SCJ 307

7. Mauritius Commercial Bank Ltd v Realpoint (Mauritius) Limited, 2015 SCJ 378

8. A séquestre judiciaire is a procedure under the Civil Code where a court orders that property of a party be administered by a guardien judiciaire until the order is lifted or the assets are sold.

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5 THINGS TO KNOW ON FLOATING CHARGES

Under Mauritian law, a floating charge is a general security interest over all present and future movable or immovable

assets (including rights), which may change in quantity and value during the security period. The principles of floating charges in Mauritius derive from English Common Law known in Anglo-Saxon jurisdictions, but the relevant provisions are found, written in French, under the Mauritian Civil Code (based on the Napoleonic Code). This is a clear illustration of Mauritius' hybrid system.

In financing transactions, the floating charges are amongst the more popular security which lenders particularly banks like to have in their security package. Caution is called for though. Below are 5 things you should have in mind when thinking of a Mauritian floating charge:

1. Parties A floating charge can be granted by a debtor or a guarantor further to or in anticipation of a facility made available by an *"institution agréée"* (an authorised body). Article 2202-2 of the Mauritian Civil Code lists the authorised bodies entitled to benefit from the charge, being the Government of Mauritius, any bank licensed under the Mauritian Banking Act 2004, any insurance company and any other local or foreign financing institution approved by the Minister of Finance. The 1988 *Institutions Agréées* Regulation of the Minister of Finance names specific entities as approved body and also includes catch-all provision for (i) any body corporate certified holding a global business licence issued by the Finance Services Commission and (ii) any body corporate not registered in Mauritius and having no place of business in Mauritius. Although these two categories of approved bodies may look very wide, the spirit of Article 2202-2 of the Mauritian Civil Code is that these entities must be "financing" entities. This principle has been touched upon in a 2014 judgement of the Commercial Division of the Supreme Court ***(Atelier Etude Limousin & ors vs BPCE International et Outremer & anor 2014SCJ166).***

2. Assets The *"assiette"* which can be covered by a floating charge is very wide as it allows the creation of a general security over all types of property and rights wherever located and whether they already exist or not in the assets of the grantor at the time of creation of the charge. In addition the floating charge is certainly one of the most flexible security interests available under Mauritian law as it allows the free disposal of the assets during the security period which is an invaluable advantage for the running of the grantor's business. The free disposal during the security period can however be limited contractually or be made subject to the beneficiary's prior consent.

3. Formalities The instruments creating the floating charge can be made by private or notarial deed and have to be registered with the Registrar General of Mauritius and inscribed in the public registers kept at the office of Conservator of Mortgages. The inscription is mandatory and it goesto the validity of the charge. The formalities have to be completed within 8 days (or 3 months if the grantor holds of global business licence issued by the Financial Services Commission). The cost associated with the registration and inscription is ad valorem but of approximately USD 1,800 if the secured obligations are higher in value to MUR 2,000,000.

4. Ranking A floating charge takes its ranking among the other secured creditors and in respect of the assets charged on the date of its inscription with the Conservator of Mortgages. The date of inscription will therefore determine whether it is a first ranking security or not. Beneficiaries of charges can agree to cede their ranking or to be treated *pari-passu*. In an insolvency procedure, a valid floating charge will benefit from a preferred ranking.

5. Enforcement A floating charge is an executory title, which means that there is no need for a judicial enforcement. However, enforcement will be subject to crystallising (converting) the floating charges into a fixed charge by drawing up an inventory of the specific assets over which the charge will be realized. The conversion into a fixed charge does not affect the ranking of the security which will remain determined by the date of inscription of the floating charge. Once assets have been identified and crystalized into a fixed charge, the beneficiary may proceed to the realisation of the security based on the nature of the underlying asset.

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FREQUENTLY ASKED QUESTIONS

FINANCIAL ASSISTANCE

Does the concept of financial assistance exist in Mauritius?

Yes, financial assistance means the provision of financial means to acquire assets whether by way of a loan, guarantee or security.

Is financial assistance regulated?

Yes. Section 81 of the Companies Act 2001 **(CA)** provides that a company shall not provide financial assistance, if the assistance is granted directly or indirectly for the acquisition of the company's own shares. This is the only instance in which financial assistance would be restricted under Mauritian laws. The rationale behind is to avoid the circuitous attempt to raise capital from the market by providing funds from the assets of the company itself.

Can this restriction be circumvented?

Yes. The financial assistance in connection with the acquisition of the company's shares will be valid if the board of directors of the company ("the grantor") resolves that (a) the granting of the assistance is in the interests of the grantor, (b) the terms and conditions of the assistance are fair and reasonable to the grantor and to any person receiving the assistance and (c) the grantor will satisfy a statutory solvency test immediately after granting the assistance.

In addition, where the amount of the assistance would cause the aggregate amount of all financial assistance granted by the company to exceed 10% of its stated capital, the company must also have an auditor's certificate that (a) the auditor has enquired into the state of affairs of the company and (b) there is nothing to indicate that the opinion of the board of directors that the solvency test is met is unreasonable.

Is there a "whitewash" procedure available?

Yes. The board approval, solvency test and auditor's certificate will not be required if the financial assistance has been approved by a unanimous shareholders' agreement under Section 272 of the CA. This "whitewash" procedure will only apply to private companies.

Are there exemptions?

Yes. The restriction for financial assistance under Section 81 of the CA does not apply to transactions listed under Section 82 of the CA which include (a) specific distributions to a shareholder (b) buy-back and redemptions (c) actions taken under a compromise or arrangement and (d) where the business of the company incudes the lending of money in the ordinary course.

COUNTRY UPDATES

TAX

Income Tax (Convention of Mutual Administrative Assistance in Tax Matters) Regulations 2015

Further to signing the Mutual Convention on Mutual Assistance in Tax Matters with the Organisation for Economic Cooperation and Development (the **Convention**) in June 2015, the Mauritian Government has published the Income Tax (Convention of Mutual Administrative Assistance in Tax Matters) Regulation 2015 (the **Regulations**) implementing the Convention.

The main aim of the Regulations is to assist in the exchange of information, assist in the recovery of tax claims and on the service of documents between the member states to the Convention. Pursuant to the Regulations, parties to the

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Convention will exchange any information that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by the Convention. In addition to the general provision on the exchange of information, a party to the Convention can:

(a) provide information to other member states also party to the Convention;
(b) automatically exchange information with respect to categories of cases and in accordance with procedures
(c) with other member states as determined by mutual agreement; or
(d) without prior request, forward to another party to the Convention information of which it has knowledge in the circumstances listed in the Article 7 of the Convention

Revised procedures for recommendation of tax residence certificates

Following the amendments brought to the Guide to Global Business, the Financial Services Commission has amended its tax residence certificate **(TRC)** application form and procedures to build-in additional substance requirements.

As from 3rd August 2015, entities wishing to follow the new TRC application process in applying for tax residency will have to use the new TRC application form. Upon receipt of the TRC application which satisfies the criteria laid out in the procedures, the Financial Services Commission will recommend the TRC application to the Mauritius Revenue Authority who is responsible for issuing the TRC.

INDUSTRY NEWS

The Dubai Financial Services Authority and the Financial Services Commission of Mauritius sign a memorandum of understanding

The Dubai Financial Services Authority and the Financial Services Commission of Mauritius have entered into a memorandum of understanding on 1st October 2015 on capacity building and other collaboration. The Financial Services Commission highlighted the importance of capacity building in the region and was of the view that the signature of the memorandum of understanding testifies to this commitment.

The Financial Services Commission of Mauritius issues the code of business conduct

On 1st October 2015, and as part of its Fair Market Conduct Programme, the Financial Services Commission issued its code of business conduct (the **Code**). The Code applies to all licensees of the Financial Services Commission, including but not limited to category one and two global business companies, management companies, asset managers, factoring and leasing companies, investment dealers and investment advisers. The Code will come into effect on 1st January 2016.

The Code establishes nine guiding principles, which are intended to ensure that licensees of the Financial Services Commission conduct their business in a manner that promotes the best interests of consumers and the integrity of the financial services industry. The Code places the onus firmly on the licensees to adopt appropriate processes and procedures in line with their business model to meet their obligations under the guiding principles set out in the Code.

The Financial Services Commission launches consultation for a new category of investment adviser for corporate finance

By way of a consultation launched on 27th July 2015, the Financial Services Commission sought the views and comments of the industry on its proposed amendment the Securities (Licensing) Rules 2007 for the inclusion a new category of investment adviser and the licence fees payable by the holders of the licence.

The Financial Services Commission proposed to amend the Security (Licensing) Rules 2007 to include a new category of investment adviser for corporate finance. The proposed amendments will see the holder of a corporate finance investment adviser license being authorised to give advice on corporate finance matters concerning securities transactions. In addition, the Financial Services Commission also consulted on the new definition of corporate *finance* to be inserted into the Security (Licensing) Rules 2007.

The Financial Services Commission is of the view that the inclusion of a new category of investment adviser will enlarge the scope of investment advisory services and promote the development of capital markets in Mauritius. The consultation closed on 3rd August 2015 and we await the publication of its outcome by the Financial Services Commission.

INVESTMENT PROMOTION AND PROTECTION

The Government of Mauritius signs investment promotion and protection agreements with the Republic of Zambia and the United Arab Emirates in quick succession

The Government of Mauritius has recently entered into investment promotion and protection agreements **(IPPA)** with the United Arab Emirates and the Republic of Zambia.

Following signature of the IPPA with the United Arab Emirates on 20th September 2015, the Minister of Finance and Economic Development, Vishnu Lutchmeenaraidoo noted the strategic importance of the agreement in light of the major development projects in the pipeline such as the maritime hub in Port Louis and the establishment of a free port in Jinfei, Mauritius. The IPPA supplements the double taxation agreement signed with the United Arab Emirates in 2006.

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Mauritius also has a double taxation agreement with the Republic of Zambia since January 2011. In signing the IPPA with the Republic of Zambia on 14th July 2015, the Government of Mauritius was of the view that the agreement will further foster favorable conditions for greater flow of investments within the territories of the two countries. The IPPA becomes the 21st investment promotion and protection agreement signed with an African country and further develops the capacity of Mauritius to become a platform for investments into the African continent.

PRIVATE PENSION SCHEMES

The Financial Services Commission of Mauritius issues rules on the appointment and powers of auditors and actuaries for private pension schemes

The Financial Services Commission has issued the Private Pension Schemes (Auditor and Actuary) Rules 2015 which came into effect on 1st August 2015.

The rules set out the procedures governing the appointment, resignation and termination of appointment of auditors and actuaries of private pension schemes.
Additionally, the rules place a whistleblowing obligation on the auditors and actuaries of private pension schemes who must submit a report to the Financial Services Commission upon becoming aware that:

- the financial soundness of the scheme is seriously prejudiced, or the ability of the scheme to comply with the Private Pension Schemes Act 2012 (the **Pension Schemes Act**), regulations and the Financial Services Commission Rules made under the Pension Schemes Act is otherwise impaired;
- there is a material change in the operations of the scheme which may jeopardise its ability to continue as a going concern;
- there has been or there is a breach of any of the provisions of the Pension Schemes Act, regulations and Financial Services Commission Rules made under the Pension Schemes Act, or any other enactment relating to the keeping of records;
- other relevant acts or Financial Services Commission Rules, codes and guidelines made by the Financial Services Commission have not been or are not being properly complied with; or
- a financial crime or any serious irregularity has been, is being, or is likely to be committed.

The underlying principles of the rules are:

- actuaries and auditors appointed to private pension schemes should be suitably qualified and experienced to conduct proper examination of the financial affairs of the schemes and report to the Financial Services Commission;
- actuaries and auditors to private pension schemes should provide advice, do valuation and provide other services in accordance with a well-established policy framework;
- the policy framework should clearly provide for duties, functions and responsibilities of actuaries and auditor of private pension schemes; and
- the Financial Services Commission may require an auditor or actuary of a private pension scheme to perform the additional duties set out in the rules.

The Financial Services Commission consults on competency standards for private pension schemes

As part of its Fair Market Conduct Programme, the Financial Services Commission has issued its competency standards in October 2014 for licensees in the insurance sector, securities sector and other licensees across sectors performing a management and control function. The competency standards formalised the competencies in terms of technical knowledge and skills that applicants must possess to be licensed. The competency standards also provided an indication to the licensees on how to demonstrate and maintain their competences. On 2nd July 2015, the Financial Services Commission launched a consultation with the view to extending these competency standards to licensees performing a management and control function in the private pension sector **(the Private Pension Competency Standards)**.

The Private Pension Competency Standards set out the criteria for determining *the fit and proper person* test under section 20 of the Financial Services Act 2007. Additionally, the Private Pension Competency Standards aim to set out the competency standards for the members of the governing body of a private pension scheme. The Financial Services Commission sought to obtain the views and suggestions of the industry on the scope of application of the Private Pension Competency Standards.

The consultation closed on 17th August 2015 and we await the publication of its outcome by the Financial Services Commission.

STOCK EXCHANGE

Memoranda of understanding with the National Stock Exchange of India Limited and Maldives Stock Exchange

The National Stock Exchange of India and the Financial Services Commission of Mauritius entered into a memorandum of understanding on 3rd September 2015 with the aim of

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fostering mutual assistance and the exchange of information. The parties expressed confidence that the memorandum will result in enhanced cooperation in the fields of education, training and knowledge transfer in the securities market, product development, index creation and capacity building in the field of market surveillance and investigation.
The memorandum with the National Stock Exchange of India swiftly followed the signature of a memorandum of understanding between the Maldives Stock Exchange and the Stock Exchange of Mauritius aimed at fostering the prosperity of the financial markets of the Maldives and Mauritius, promote cross-border listing and explore further opportunities for cooperation between the two institutions.

The Financial Services Commission of Mauritius issues circular letter on the procedures for registration of prospectus

The Financial Services Commission launched a consultation on 26th May 2015 in relation to the registration process for prospectus where there is an offer of securities to the public. Further to this, the Financial Services Commission has, on 24th September 2015 issued a circular letter to inform all stakeholders of the procedures for registration of prospectus where there is an offer of securities to the public or a rights issue. These procedures are applicable with immediate effect.

A prospectus will now be registered following a three-stage procedure which begins with the applicant filing the prospectus with, and paying the prescribed fee to, the Financial Services Commission who will then issue an acknowledgement of filing. The Financial Services Commission will then review the prospectus, and subject to the necessary amendments being made to the prospectus, the Financial Services Commission will grant a provisional registration of the prospectus. Lastly, the Financial Services Commission will register the prospectus if all the amendments requested have been implemented into the prospectus and the prospectus complies with the requirements set out in the circular letter.

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